Appendix G

GUIDANCE LETTERS ON INTERPRETATION OF FERPA AND HIPAA RULES FROM U.S. DEPARTMENT OF EDUCATION

To University of New Mexico (2003)

To New Bremen Local Schools (1994)

Letter to University of New Mexico (November 2004)

November 29, 2004

Ms. Melanie P. Baise
Associate University Counsel
The University of New Mexico
Scholes Hall 152
Albuquerque, New Mexico 87131-0056

Dear Ms. Baise:

This responds to your letters of February 4 and July 9, 2003, in which you asked about a potential conflict between the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and State laws that impose mandatory reporting requirements on university health care providers and other school officials. This Office administers FERPA and is responsible for providing technical assistance to ensure that educational agencies and institutions comply with the statute and regulations codified at 34 CFR Part 99. An educational agency or institution that determines that it cannot comply with FERPA due to a conflict with State or local law is required to notify this Office within 45 days, providing the text and citation of the conflicting law. 34 CFR § 99.61.

Issues

The first letter concerns operation of the University of New Mexico's Student Health Center, which provides medical services to students. You explained that New Mexico Health Department regulations provide for mandatory reporting to the State Department of Health of "a range of diseases and injuries, including sexually transmitted diseases, HIV, AIDS, communicable diseases, infectious diseases, health conditions related to environmental exposures and certain injuries and cancer." 7 NMAC 4.3. Communicable diseases must be reported "immediately" to the State Office of Epidemiology. 7 NMAC 4.3.12(A). You noted that reports must include personal information about the student-patient, including name; date of birth/age; sex; race/ethnicity; address; and telephone number, and that all reports are confidential. 7 NMAC 4.3.12(C), 4.3.9(I), 4.3.10(F). Your concern is that if students refuse to provide written consent, or do not provide it in a timely manner, these mandatory reporting requirements may conflict with FERPA if the disclosures do not fall within the exception for disclosure of education records "in connection with a health or safety emergency."

Your second letter identified two additional State mandatory reporting requirements that may conflict with FERPA. The first is the Abuse and Neglect Act, NMSA 1978 Sec. 32A-4-1 et seq., (1999 Repl. Pamp.) codified in the New Mexico Children's Code. According to your letter, this law requires "every person" who "knows or has a reasonable suspicion that a child is an abused or a neglected child [to] report the matter immediately to" local law enforcement, the Department of Children, Youth and Family,

or tribal law enforcement or social services agencies for any Indian child residing in Indian country. The second law is the Adult Protective Services Act, which provides that "any person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited shall immediately report that information to the [Department of Children, Youth and Families]." NMSA 1978 Sec. 27-7-30(A)(1999 Repl. Pamp.) The report must include the name, age, and address of the incapacitated adult, any person responsible for the adult's care, and other relevant information. In both cases, failure to report abuse as required may be punished as a misdemeanor. Your concern is that university health care providers who submit reports about students under these statutes might violate FERPA.

Applicable FERPA Provisions

FERPA protects the privacy interests of parents and students in a student's "education records." Educational agencies and institutions subject to FERPA may not have a policy or practice of disclosing "education records, or personally identifiable information contained therein other than directory information … without the written consent of their parents …" except as provided by statute. 20 U.S.C. § 1232g(b)(1); 34 CFR § 99.30. All FERPA rights transfer from parents to students when the student reaches 18 years of age or attends a postsecondary institution. 20 U.S.C. § 1232g(d); 34 CFR § 99.3 ("Eligible student").

Under FERPA, "education records" are defined as

> those records, files, documents, and other materials which –
> (i) contain information directly related to a student; and
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 ("Education records"). The term "student"

> includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C. § 1232g(a)(6); 34 CFR § 99.3 ("Student").

FERPA excludes four categories of information from the term "education records" including

> (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to

> anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B); 34 CFR § 99.3 ("Education records"). These are commonly known as "treatment records" of eligible students.

FERPA applies to an educational agency or institution that receives funds under programs administered by the U.S. Secretary of Education. 34 CFR § 99.1(a). If an agency or institution receives funds under one or more of these programs, FERPA applies to the recipient as a whole, including each of its components, such as a department within a university. 34 CFR § 99.1(d).

Records maintained on students at a campus health center are "education records" subject to FERPA because they are directly related to a student and maintained by the institution or by a party acting for the institution. The records of a campus-based student health center would not be subject to FERPA if the center is funded, administered and operated by or on behalf of a public or private health, social services, or other non-educational agency or individual. (We note that final regulations promulgated under the 1996 Health Insurance Portability & Accountability Act (HIPAA), codified at 45 CFR Parts 160 and 164, provide that health care information that is maintained as an "education record" under FERPA is not subject to the HIPAA Privacy Rule precisely because it is protected under FERPA. See 45 CFR § 164.501, *Protected health information.* A campus health care provider that is not subject to FERPA may be subject to the HIPAA Privacy Rule instead.) As explained further below, based on the information provided in your letters, we agree with your conclusion that student health records maintained by the University's Student Health Center are "education records" subject to FERPA.

Under the provisions cited above, records maintained by the University's Student Health Center on student-patients are excluded from the definition of "education records" under FERPA only if they are made, maintained, and used only in connection with the student's treatment and not disclosed to anyone other than individuals providing treatment to the student. If these records are disclosed in personally identifiable form to the State Department of Health or other agencies for reasons other than the student's "treatment," then the records are no longer excluded from the statutory definition of "education records" and may only be disclosed in accordance with FERPA requirements. That is, the student must provide a signed and dated written consent in accordance with section 99.30 of the FERPA regulations or the disclosure must fall within one of the exceptions to that requirement as set forth in section 99.31(a).

State Law Reporting Requirements

1. Reporting of Notifiable Conditions and Cancer.

Regulations issued by the New Mexico Department of Health for "Control of Disease and Conditions of Public Health Significance" impose mandatory reporting requirements for

"notifiable conditions," which include both "communicable diseases" and "conditions of public health significance." 7 NMAC 4.3.7 J. "Communicable disease" means "an illness caused by infectious agents or their toxic products which may be transmitted to a susceptible host." "Condition of public health significance" means "a condition dangerous to public health or safety." 7 NMAC 4.3.7 D & E.

Certain communicable diseases require immediate reporting on an "emergency basis." These include vaccine preventable diseases, such as measles, mumps, haemophilus influenzae, invasive infections, rubella, tetanus, etc., and other diseases such as anthrax, botulism, cholera, E.coli infections, Hantavirus, rabies, smallpox, tuberculosis, yellow fever, as well as suspected food and waterborne illnesses and those suspected to be caused by release of biologic or chemical agents. 7 NMAC 4.3.12 A. "Routine" (i.e., non-emergency) reporting is required for various infectious diseases, including but not limited to Colorado tick fever, encephalitis, hepatitis, Legionnaires' disease, Lyme disease, malaria, Reye syndrome, toxic shock syndrome, etc.; sexually transmitted diseases, such as chlamydia, gonorrhea, syphilis, HIV, and AIDS; birth defects; and health conditions related to environmental exposures and certain injuries, such as asbestosis, firearm injuries, lead blood levels, pesticide-related illness, silicosis, spinal cord injuries, traumatic brain injuries, and other environmentally-induced health conditions. 7 NMAC 4.3.12 B.

State health regulations provide that health care professionals, laboratories, and "any other person … having knowledge of any person having or suspected of having a notifiable condition, shall immediately report the instance to the Office [of Epidemiology of the Department of Health]." 7 NMAC 4.3.8. "Other person" includes but is not limited to an official in charge of any health facility, the principal or person in charge of any private or public school or child care center, teachers and school nurses. 7 NMAC 4.3.7 L. All reports must include the patient's name, date of birth/age, sex, race/ethnicity and telephone number, along with the problem reported. 7 NMAC 4.3.12 C. In addition, the Department of Health may have access to all medical records of persons with, or suspected of having notifiable diseases or conditions of public health significance. 7 NMAC 4.3.9 H. (The Department of Health may also require exclusion of infected and non-immune persons, including students, patients, employees, or other persons, and order closure and discontinuance of operations in specified circumstances, where any case of communicable disease occurs or is like to occur in public, private, or parochial school or health care facility. 7 NMAC 4.3.9 D.)

State health regulations also designate the New Mexico Tumor Registry as the agency responsible for operating a statewide cancer registry. 7 NMAC 4.3.10 A. Hospitals and other facilities providing screening, diagnostic or therapeutic services to patients must report cancer cases to the cancer registry. 7 NMAC 4.3.10 B. Health care professionals (such as a school nurse) diagnosing or providing treatment for cancer patients, except for cases directly referred to or previously admitted to a hospital or other facility, must also report cancer cases to the registry. 7 NMAC 4.3.10 C. The cancer registry is authorized to access all records of physicians and surgeons, hospitals, outpatient clinics, nursing

homes, and all other facilities, individuals or agencies providing cancer related services. 7 NMAC 4.3.10 D.

All reports of notifiable conditions and cancer case data are confidential. Disclosure to any person of reported information that identifies or could lead to the identification of an individual is prohibited except for purposes of prevention, control, or research or, in the case of cancer reporting, for reporting to other state cancer registries and local and state health officers. 7 NMAC 4.3.9 I and 4.3.10 F.

2. Reporting of Abuse and Neglect

You also asked about two other State laws. The first is the Abuse and Neglect Act, part of the New Mexico Children's Code, which requires every person, including a nurse, schoolteacher, or school official, who "knows or has a reasonable suspicion that a child is an abused or a neglected child [to] report the matter immediately" to local law enforcement, the county department of children, youth and family, or tribal law enforcement or social services agencies (for Indian children residing in Indian country). NMSA 1978 § 32A-4-3 A. This section also provides that these agencies are entitled to have access to "any of the records pertaining to a child abuse or neglect case maintained by any of the persons [required to report abuse or neglect under this statute]" except as otherwise provided. NMSA 1978 § 32A-4-3 E. You pointed out that the law does not enumerate what items of information must be reported, but undoubtedly the institutional official making the report would be asked to provide the name of the student. Failure to report abuse as required is a misdemeanor under § 32A-4-3 F.

The second State law is the Adult Protective Services Act, which provides that "any person having a reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited shall immediately report that information to the department [of children, youth and families]." NMSA 1978 § 27-7-30 A. The report must contain the name, age and address of the adult, the name and address of any other person responsible for the adult's care, the extent of the adult's condition, the basis of the reporter's knowledge, and other relevant information. NMSA 1978 § 27-7-30 B. Failure to report abuse as required is a misdemeanor under § 27-2-30 C.

In both cases, these reports may require the disclosure of personally identifiable, non-directory information from education records. You indicated that University health care providers may obtain information about students that would require them to submit a report under these State laws.

Discussion

As noted above, health or medical "treatment records" of postsecondary students are excluded from the FERPA definition of education records provided they are disclosed only to individuals providing treatment. Our review of the mandatory State reporting requirements described above indicates that any "treatment records" maintained by the University would lose that status if they were disclosed pursuant to any of these State

laws. In particular, the mandatory reporting of notifiable conditions and cancer cases addresses general concerns of public health and safety and not treatment for the individual who is the subject of the disclosure. Similarly, while the reporting requirements established under the State's abuse and neglect laws are intended to protect the subject individuals, the disclosure of information to law enforcement, social services, legal assistance, and other agencies cannot be considered "treatment" under this FERPA exception to the definition of "education records" in FERPA. Accordingly, we find that personally identifiable information from education records that is disclosed pursuant to any of these State laws may not be considered "treatment records" and is subject to all FERPA requirements.

FERPA provides that prior written consent is not required to disclose properly designated "directory information" from education records. 34 CFR §§ 99.31(a)(11) and 99.37. "Directory information" means information that would not generally be considered harmful or an invasion of privacy if disclosed, including the student's name, address, telephone number, date of birth, and so forth. See 34 CFR § 99.3 ("Directory information"). Communicable diseases and other notifiable conditions about an individual student may not be designated and disclosed as directory information under FERPA because this is the type of information that would generally be considered an invasion of privacy if disclosed. This is consistent with the confidentiality requirements imposed under State law for the mandatory reporting of this information, as noted above.

Another FERPA provision allows an educational agency or institution to disclose personally identifiable information from education records, without prior written consent,

> in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) 99.36.

Congress added this exception to the written consent requirement when FERPA was first amended, on December 13, 1974. The legislative history demonstrates Congress' intent to limit application of the "health or safety" exception to exceptional circumstances --

> Finally, under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for "health or safety" could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.

Page 7 – Ms. Melanie P. Baise

Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974. (These amendments were made retroactive to November 19, 1974, the date on which FERPA became effective.)

Section 99.31(a)(10) of the regulations provides that the disclosure must be "in connection with a health or safety emergency" under the following additional conditions:

> An educational agency or institution may disclose personally identifiable information from an education record to *appropriate parties* in connection with *an emergency* if knowledge of the information is necessary to protect the *health or safety* of the student or other individuals.

34 CFR § 99.36(a)(emphases added.) In accordance with Congressional direction, the regulations provide further that these requirements will be strictly construed. 34 CFR § 99.36(c).

The Department has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. While the exception is not limited to emergencies caused by terrorist attacks, the Department's Guidance on "Recent Amendments to [FERPA] Relating to Anti-Terrorism Activities," issued by this Office on April 12, 2002, provides a useful and relevant summary of our interpretation (emphasis added):

> [T]he health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attach such as the September 11 attack. However, *any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student's education records.*
>
> Under the health and safety exception school officials may share relevant information with "appropriate parties," that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. (Citations omitted.) Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception….
>
> The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. …

Page 8 – Ms. Melanie P. Baise

By way of example, in accordance with these principles we concluded in a 1994 letter that a student's suicidal statements, coupled with unsafe conduct and threats against another student, constitute a "health or safety emergency" under FERPA. However, we also noted that this exception does not support a general or blanket exception in every case in which a student utters a threat. More recently, in 2002 we advised that a school district could disclose information from education records to the Pennsylvania Department of Health, without written consent, where six students had died of unknown causes within the previous five months. These facts indicated that the district faced a specific and grave emergency situation that required immediate intervention by the Department of Health to protect the health and safety of students and others in the school district.

With regard to reports required under state law, in 2000 we advised a state senator about a potential conflict between FERPA and a state law that requires a school to notify the appropriate law enforcement agency immediately if it receives a request for the records of a child who has been reported missing, and then notify the requesting school that the child has been reported missing and is the subject of an ongoing law enforcement investigation. Once again noting that the "health and safety emergency" exception generally does not allow a blanket release of personally identifiable, non-directory information from education records, we concluded that FERPA would allow school personnel to comply with this law

> only if the school has made a case-by-case determination that there is a *present and imminent threat or danger* to the student or that information from education records is needed to avert or diffuse serious threats to the safety or health of a student….In the case of a missing child, we agree that law enforcement officials would constitute an appropriate party for the disclosure *assuming that the school has first determined that a threat or imminent danger to the child exists.*

May 8, 2000, letter to Pennsylvania State Senator Stewart J. Greenleaf (emphases added.)

In summary, the University may disclose personally identifiable, non-directory information from education records under the "health or safety emergency" exception only if it has determined, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law.

The New Mexico Department of Health has made a reasonable determination, by regulation, which specific, communicable diseases require immediate reporting on an

"emergency" basis. 7 NMAC 4.3.12(A). This Office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational. We find that the State reporting requirement for communicable diseases satisfies the FERPA requirement for a case-by-case determination that a specific situation, i.e., an identified communicable disease, presents an imminent danger or threat to students or other members of the community, that the release is narrowly tailored to meet the emergency, and that reports are made to appropriate authorities within the health department. Therefore, the University may disclose personally identifiable information from education records, without written consent, to meet these State health reporting requirements.

We cannot come to the same conclusion with respect to the "routine" or non-emergency reporting that is required by regulation for other notifiable conditions, including the infectious diseases, injuries, environmental exposures, sexually transmitted diseases, HIV/AIDS, cancer, and birth defects specified in 7NMAC 4.3.12 B, as well as reports to the New Mexico Tumor Registry required under 7 NMAC 4.3.10. Indeed, in these cases, the State Department of Health has determined that the specified disease or condition *does not* constitute an imminent danger or threat or that emergency reporting or other action is necessary to address the concern. Consequently, the University may not disclose information from a student's education records to meet these "routine" health reporting requirements unless it has made a specific, case-by-case determination that a health or safety emergency exists, as described above, or the student provides prior written consent for the disclosure in accordance with section 99.30 of the FERPA regulations.

In regard to the reporting required under New Mexico's Abuse and Neglect Act, in 1997 this Office reviewed State laws in Maine and Texas that require schools to report known or suspected cases of child abuse or neglect to designated officials. While we first determined that the "health and safety emergency" exception in FERPA would not permit a blanket release of personally identifiable information from a student's education records in every case where a teacher "knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected," we also concluded that these state laws actually presented a conflict between FERPA and another, later-enacted Federal law that superseded FERPA and allowed these disclosures without consent.

In particular, the Federal Child Abuse Prevention, Adoption and Family Services Act of 1988 amended the Child Abuse Prevention and Treatment Act (CAPTA) by providing that a State must enact laws that require reporting of known and suspected instances of child abuse and neglect in order to receive grants for abuse prevention and treatment programs. See 42 U.S.C. § 5106a(b)(1)(A) and 45 CFR § 1340.14(c). (States must also ensure that the disclosure and redisclosure of information concerning child abuse and neglect is made only to persons or entities determined by the State to have a need for the information. 42 U.S.C. § 5106a(b)(4)(A).) It is clear that in some instances the mandatory reporting may require the release of personally identifiable information from education records protected under FERPA. Congress enacted the basic privacy protections of FERPA in 1974. Following well-established standards of statutory

construction, we were unable to interpret these two laws (CAPTA and FERPA) so that they did not conflict and concluded that Congress intended to supersede FERPA in this instance and allow reports of child abuse to take place, including disclosure of personally identifiable information from education records, without parental consent.

Under this analysis, University personnel may comply with the specific reporting requirements in New Mexico's Abuse and Neglect Act and regulations to the extent that these State requirements comply with CAPTA (including regulations promulgated pursuant to CAPTA) and conflict with specific provisions in FERPA. We would be pleased to answer any more detailed questions you may have in this regard about reporting requirements under this State law.

New Mexico's Adult Protective Services Act requires "[a]ny person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited" to "immediately report that information to the [department of children, youth and families]." Records created or maintained pursuant to investigations under this law are "confidential" and may not be disclosed directly or indirectly to the public. However, these records are open to inspection by numerous agencies and individuals other than the Department of Children, Youth and Families and the alleged victim, including court personnel; personnel of any State agency with a legitimate interest in the records; law enforcement officials; any State government social services agency in any other State; health care or mental health professionals involved with the alleged victim; parties and their counsel in all legal proceedings brought pursuant to the Adult Protective Service Act; persons who have been or will in the immediate future provide care or services to the adult (except the alleged abuser); persons appointed by the court to serve as guardian, visitor, or qualified health care professional; any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court; and protection and advocacy representatives pursuant to the Federal Developmental Disabilities Assistance and Bill of Rights Act and Protection and Advocacy for Mentally Ill Individuals Act. Records of substantiated cases are also provided to the State Department of Health, the District Attorney's Office, the Medicaid Fraud Control Unit, and the Office of the Long-Term Care Ombudsman for "appropriate additional action." N.M. Stat. Ann. § 17-7-29.

We are not aware of any Federal law comparable to CAPTA that applies to the reporting required under the Adult Protective Services Act. In regard to disclosing information from education records without prior written consent, there may well be many instances in which a University official who has a legal responsibility to make a report about an incapacitated adult under State law, particularly one who appears "abused," could also conclude that a "health or safety emergency" exists under the FERPA exception as explained above. However, given the inclusion in the State reporting requirement of the standards of "neglect" and "exploitation," which may not present immediate risk to an incapacitated adult, or may not implicate the adult's "health or safety," we cannot conclude that the State has made a case-by-case determination that a "health or safety emergency" exists in these circumstances. In addition, the wide variety of parties who may obtain access to information disclosed initially to the Department of Children, Youth and Families may not meet the FERPA requirement that the information be redisclosed

only in accordance with the requirements of 20 U.S.C. § 1232g(b)(4)(B) and 34 CFR § 99.33(a). Therefore, the University may not disclose personally identifiable information from education records to comply with the Adult Protective Services Act without the student's prior written consent unless it has made a specific, case-by-case determination that a "health or safety emergency" exists, as described above, or some other exception to the prior written consent requirement applies. Further, if such a determination is made, the University must also advise the Department of Children, Youth and Families that it may not redisclose any personally identifiable information from education records to any other party except in accordance with the requirements of 20 U.S.C. § 1232(b)(4)(B) and § 99.33 of the FERPA regulations. See also 34 CFR § 99.33(e), which provides a penalty for third-party redisclosure of education records in violation of FERPA requirements.

Finally, we note that under State law the Department of Health has authority to prescribe the duties of public health nurses and school nurses, and that all school health personnel (except physical education staff), "are under the direct supervision and control of the district health officer in their district. They shall make such reports relating to public health as the district health officer in their district requires." Public Health Act §§ 24-1-3 G and 24-1-4 D. These State laws do not remove records maintained by the University's Student Health Center from coverage under FERPA because it appears that health services are provided to students by, on behalf of, and under the control of the University, and not a separate health agency or health care provider. We would be pleased to evaluate any additional facts you wish to share on this point.

I trust that this is helpful in explaining the scope and limitations of FERPA as it pertains to your inquiry. Should you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Letter to New Bremen Local Schools (1994)

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HUMAN RESOURCES AND ADMINISTRATION

[redacted]
Superintendent
New Bremen Local Schools
202-210 South Walnut Street
New Bremen, Ohio 45869

SEP 2 2 1994

Complaint No. [redacted]
Family Educational Rights
and Privacy Act (FERPA)

Dear [redacted]

This is in regard to the complaint filed by [redacted] under the Family Educational Rights and Privacy Act (FERPA) against the [redacted] (School System). Specifically, [redacted] alleged that the School System violated FERPA when it disclosed personally identifiable information, without written consent, from his grandson [redacted] education records to the juvenile court system. By letter dated March 9, 1992, the School System asserted that the disclosure came within an exception of FERPA permitting disclosure if disclosure is required by a State law passed prior to November 19, 1974. By letter dated December 3, 1992, this Office informed the School System that the State law cited does not require such disclosure, and that a FERPA violation had therefore occurred.

However, by letter dated December 22, 1992, you informed this Office that the School System also believes that the disclosure was necessary to protect the health or safety of [redacted] or other individuals and would therefore be permitted under another exception to FERPA's consent requirement. You asked that we reconsider our finding on this alternative basis. You delineated in that letter specific instances of behavior problems with [redacted] which you believe constituted a health or safety emergency. Because you asked this Office to reconsider its finding, we requested clarification of the School System's new response to the allegation, particularly why the disclosure was necessary to protect certain individuals, why the situation was perceived as an emergency, and why the juvenile court was deemed the appropriate party to deal with the emergency.

By letter dated February 2, 1993, your attorney, [redacted], responded on your behalf. In response to our requests for particular information regarding your claim that the information was disclosed pursuant to the health or safety exception, [redacted] reiterated information that you previously provided. Specifically, he stated:

> [W]ithin a 5-day period of time [redacted] made suicidal statements, made threats upon another student, and engaged in unsafe conduct. . . . [redacted] misconduct and statements during the week of September 20, [1991], provided [the School System] with "a pressing need" to bring the matter to the attention of appropriate authorities who could intervene. The Juvenile Court was exactly such an appropriate authority, and it did appropriately intervene, as seen in the resulting Judgment Entry.

As will be explained more thoroughly below, this Office has again reviewed the material provided in connection with this investigation, as well as the additional information you have provided since we issued a finding. Based on that review, this Office is revising its previous finding. In particular, this Office finds that the School System did not violate FERPA by disclosing to the Court information from [redacted] education records when the unruly child complaint was filed with Juvenile Court. However, this Office finds that the School System violated FERPA when it disclosed additional information from [redacted] education records in response to an informal request from the court and during the Adjudicatory Hearing as alleged.

As you are aware, FERPA generally requires a parent's prior written consent before disclosing personally identifiable information from education records. However, there are certain exceptions to this requirement. One of those exceptions permits disclosure in connection with health or safety emergencies. Specifically, section 99.36 of the FERPA regulations states:

> (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
>
> (b) Paragraph (a) of this section shall be strictly construed.

In enforcing this provision we require the institution to show that the disclosure was made to a party that could appropriately

deal with the emergency and the information disclosed was pertinent and necessary for the appropriate party to protect the health or safety of the student or other individuals.

We have determined for clarity to consider [redacted] complaint that the School System violated FERPA when it disclosed personally identifiable information from [redacted] education records to the Juvenile Court as three separate allegations. The three allegations are:

1) the alleged improper disclosure of information from education records to the Juvenile Court when the "Unruly Child" complaint was filed on September 26, 1991;

2) the alleged improper disclosure of information from education records to the Juvenile Court in response to the September 26, 1991, informal request from the court for such records; and

3) the alleged improper disclosure of information from education records during the November 7, 1991, Adjudicatory Hearing.

Analysis of each of these allegations is set forth below.

ALLEGATION 1

[redacted] alleged that the School System improperly disclosed information from [redacted] education records to the Juvenile Court when it filed an Unruly Child complaint on September 26, 1991.

In his February 2, 1993, letter to this Office, [redacted] stated that you filed the Unruly Child complaint "because of [your] urgent concern for [redacted] health and safety and the health and safety of other students in the [redacted] Schools." Citing your December 21, 1992, letter to this Office and the complaint you filed with the Court, [redacted] further stated that "within a 5-day period of time [redacted] made suicidal statements, made threats upon another student, and engaged in unsafe conduct." [redacted] provided a complete copy of the complaint filed on September 26, 1991, which referred to various incidents supporting the claim that [redacted] was an unruly child. In addition to incidents involving [redacted] improper use of a cigarette lighter and a "swivel knife," other incidents cited in the complaint include [redacted] threats to beat up another student and his statements that he wished he were dead. It therefore appears that you and other school officials had sufficient reason to believe that there was a "pressing need" or emergency situation which required action.

Further, [redacted] provided this Office with a copy of a request, also filed on September 26, 1991, that the "Court issue a warrant to the [redacted] County Sheriff to pick up [redacted] and cause him to be placed in detention until such time as the Court can have a hearing on this matter." This request, which was filed by the prosecuting attorney in this unruly child complaint, [redacted], further states that "it is believed that the child is not receiving proper care and his removal may be necessary to prevent immediate or threatened physical or emotional harm, his removal is necessary to prevent immediate or threatened physical or emotional harm to others. . . ." Accordingly, it appears that the School System filed the Unruly Child complaint and the subsequent request specifically because it had determined that the Court could appropriately and immediately deal with the identified emergency.

Finally, the unruly child complaint that was filed on September 26, 1991, includes personally identifiable information from [redacted] education records that is limited to a chronological history of his inappropriate behavior during the month of September. The disclosure of this information was necessary to support the unruly child complaint and the request that he be detained to protect the health or safety of [redacted] and other individuals.

Accordingly, it appears that the initial disclosure of information from [redacted] education records to the Juvenile Court in connection with the unruly child complaint was within the guidelines of the health or safety exception to the limitation on disclosure of information from education records without prior written consent. Therefore, this Office finds that no violation of FERPA occurred when the School System filed the unruly child complaint and in so doing disclosed information from [redacted] education records.

ALLEGATION 2

[redacted] alleged that the School System improperly disclosed information from [redacted] education records to the Juvenile Court in response to the September 26, 1991, informal request from the court for such information. In particular, by request dated September 26, 1991, [redacted] Juvenile Judge for the [redacted] County [redacted] Court, Juvenile Division, asked that the [redacted] School provide "a photocopy of the child's current report card and attendance record," as well as comments on [redacted] before Wednesday October 2, 1991, in preparation for the court hearing. In this regard, by letter dated March 9, 1992, [redacted] an attorney who initially responded to this FERPA complaint on behalf of the School System, informed this Office that:

> Both R.C. 2151.28(J) and Ohio Rules of Juvenile Procedure 17 provide the court with subpoena power to get documents. However, R.C. 2151.35(A) encourages the court to conduct its hearings in an informal manner. . . .since the Juvenile Court has the authority to enforce the submission of documents and information necessary to an adjudication of unruliness, the school was clearly authorized, even required, to release the information it did in this case.

This Office has determined that the Juvenile Court did not continue to be an "appropriate authority" to deal with the identified emergency after the initial disclosure of personally identifiable information from [redacted] education records. In particular, on September 26, 1991, Judge [redacted] issued a Judgment Entry in which he denied [redacted] request that [redacted] be detained pending adjudication of the unruly child complaint. Accordingly, when the court determined not to detain [redacted] pending adjudication of the complaint, the School System no longer had reason to consider the Court to be an "appropriate party" to deal with the emergency it had identified, as described above.

Moreover, in response to our request for an explanation of why the School System continued to perceive the Juvenile Court as an appropriate authority to handle the emergency, [redacted] merely stated "The Juvenile Court was exactly such an appropriate authority . . ." and referred to the Judgment Entry issued after the unruly child complaint was heard. While the Court did find that [redacted] is an unruly child, as evidenced by the November 7, 1991, Judgement Entry, and while the [redacted] Revised Code 2151.022 defines an unruly child to include, in part, "any child . . . who so deports himself as to injure or endanger the health or morals of himself or others," the court did not address the matter in an immediate manner, as commonly implied by the word "emergency." Specifically, the complaint was filed on September 26, 1991, and was not heard until November 7, 1991, over one month later. While [redacted] provided evidence that an Adjudicatory Hearing was held on October 2, 1991, and that at that time the matter was continued until November 7, 1991, to allow [redacted] time to seek legal counsel, there is no evidence that the School System objected to the continuance. Additionally, the Court's November 7 ruling advised [redacted] to "simply obey the rules and regulations as established by his teachers," and indicated that if he continued to exhibit disruptive behavior he could be placed in a juvenile detention facility. Although [redacted] points out that the November 7 Judgment Entry cites an incident "where [redacted] was literally out of control due to his excessive anger," it does not appear that the hearing concentrated on the impact of [redacted] disruptive behavior on the health or safety of [redacted] or others. Rather, a review of the November 7 Judgment Entry indicates that

the Court did not directly address or express concern about the apparent emergency the School System had identified, particularly the fact that [redacted] was displaying suicidal tendencies and was threatening other students. Accordingly, because the Court did not detain [redacted] and because the proceedings regarding the Unruly Child complaint were held over a month after the filing of the complaint and even then did not address the emergency health or safety risks identified by the School System, this Office finds that the Court ceased to be an appropriate party to deal with the emergency.

Additionally, the School System has failed to identify how the knowledge of the information in [redacted] report card and attendance record was necessary to protect the health or safety of the student or other individuals. As explained above, this requirement is specifically delineated in the regulations regarding disclosure of education records pursuant to the health or safety exception.

Accordingly, because the Juvenile Court ceased to be an appropriate authority to handle the health or safety emergency initially identified by the School System, and because there is no evidence that the disclosure of information from [redacted] report card and attendance record was necessary to protect [redacted] or other individuals' health or safety, this Office finds that the School System violated FERPA when it disclosed information from [redacted] education record to the Juvenile Court pursuant to Judge Moser's informal request.

ALLEGATION 3

[redacted] alleged that the School System improperly disclosed information from [redacted] education records during the November 7, 1991, Adjudicatory Hearing. Specifically, Mr. [redacted] alleged that you, [redacted], one of [redacted] teachers, and [redacted], Principal, disclosed information while providing testimony in court regarding the unruly child complaint.

As described above under Allegation 2, the Juvenile Court was not an appropriate authority to deal with the emergency in that it did not take immediate action to deal with the identified emergency and, in the proceedings, the perceived threat to the health or safety of individuals was at most a secondary issue to [redacted] disruptive behavior. Moreover, it is not clear how some of the information that was disclosed during the Adjudicatory Hearing is relevant for any appropriate authority to deal with the fact that [redacted] behavior posed a health or safety threat to himself or other individuals. In particular, it does not

appear that the disclosure of [redacted] reading and math skills, as made by [redacted] in her testimony, was necessary to protect [redacted] or other individuals' health or safety. Accordingly, this Office finds that the School System violated FERPA when it disclosed information from [redacted] education records during the Adjudicatory Hearing.

Please note that the findings of allegations 2 and 3 do not prevent the School System from disclosing information to a court in similar situations. Section 99.31(a)(9) of the regulations permits a school to disclose information from education records pursuant to a valid court order or lawfully issued subpoena upon the condition that the School System has made a reasonable attempt to notify the student's parents of the court order or subpoena prior to disclosure.

In this regard, [redacted] informed this Office in his February 2 letter that school officials have been informed that information disclosed to a court are to be made pursuant to section 99.31(a)(9). [redacted] further stated that school officials have been informed that they should "exercise their good judgment and discretion in disclosing records pursuant to the health or safety emergency exception." However, this is not sufficient. We are therefore asking that you provide assurance that appropriate officials in the School System have been specifically advised of the FERPA limitations on the disclosure of personally identifiable information derived from education records and of the need to ensure that any nonconsensual disclosures made under the health or safety emergency exception are made only to appropriate parties to deal with the emergency situation and that the only information from education records disclosed to such parties is necessary for such parties to protect the health or safety of the student or other individuals. Please provide this assurance within two weeks of your receipt of this letter. We will close the complaint upon receipt of the above requested assurance.

[redacted] raised two issues in his letter that are not directly related to this investigation. These issues are addressed below.

[redacted] questioned a statement this Office made in the January 22 letter. Specifically, [redacted] takes issue with a suggestion this Office made for a school to record the basis on which a disclosure is made under the health or safety exception. In this regard, [redacted] cites commentary which accompanied the deletion of four regulatory factors previously used by schools to determine whether a health or safety emergency warranted the disclosure of education records or personally identifiable information from education records without prior written consent.

The portion of the commentary which [redacted] cites states:

> The Secretary based his decision to remove the non-statutory criteria from the regulation on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation. It is the Secretary's opinion that Congress did not intend to require that regulations be promulgated that would impose burdensome requirements on agencies and institutions. Id. 11957 (emphasis added).

[redacted] further states that "there is no regulatory requirement that a [d]istrict consider specific criteria or that it document its decision-making process in determining to disclose the records to meet a safety or health emergency. Rather, it is clear that the Secretary intends for educational agencies to use their good judgment and discretion in the matter."

Any time a school discloses personally identifiable information from a student's education records in connection with a health or safety emergency, that disclosure could be the subject of a complaint filed with this Office. Therefore, if a school documents circumstances surrounding a disclosure made pursuant to the health or safety emergency exception, and a complaint containing specific allegations of fact giving reasonable cause to believe that a disclosure was made, the school could simply respond to the complaint stating that the disclosure was made within the health or safety exception and provide a copy of documentation made at the time of the disclosure. The time involved for the District to respond to the complaint and for this Office to review the response to determine whether regulatory requirements were met would be minimal.

[redacted] also questioned [redacted] legal standing with regard to filing a complaint under FERPA. He asserted that since [redacted] has not presented evidence to support his claim that he is [redacted] guardian, he should not be permitted to pursue a complaint under FERPA.

The term "parent" is defined to include natural parents, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. The Department has determined that a parent is absent if he or she is not present in the day-to-day home environment of the child. Accordingly, a grandparent has rights under FERPA where the grandparent is present on a day-to-day basis with the child and the natural parent or guardian is absent from that home. In his January 2, 1992, letter to this Office, [redacted] identified himself as "the legal parent of [redacted]." He also provided with that letter: a copy of the

terms of probation which he signed on November 7, 1991, as [redacted] guardian; a copy of an Individualized Education Program which he signed on August 27, 1991, as [redacted] "parent;" and a copy of the November 7, 1991, Judgment Entry which states:

> The child, [redacted] and his custodial grandparents, [redacted] . . . .

There is no indication that a natural parent of [redacted] was or is present in the home on a day-to-day basis and all indications were that [redacted] was indeed acting as a parent with regard to the custody and control of [redacted]. Accordingly, it appears that [redacted] is [redacted] "parent" as that term is defined in FERPA.

I trust that the above information is helpful to you.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: [redacted]

TOTAL P.10